IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 02-32364

ROBERT LEE MARTIN
d/b/a M&M UPHOLSTERY
d/b/a MARTIN'S MARINE & UPHOLSTERY

Debtor

TINDELL'S, INC.

Plaintiff

v. Adv. Proc. No. 02-3153

ROBERT LEE MARTIN

Defendant

M E M O R A N D U M

APPEARANCES: HAYNES, MEEK, SUMMERS & RUBLE
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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is before the court upon the Complaint Objecting to Dischargeability of a Debt and to Debtor's Discharge (the Complaint) filed by the Plaintiff, Tindell's, Inc., on September 10, 2002, objecting to the Debtor's discharge under 11 U.S.C.A. §§ 727(a)(2), (4), or (5) (West 1993), or in the alternative, for a determination of nondischargeability under 11 U.S.C.A. § 523(a)(2)(B) (West 1993 & Supp. 2003). Pursuant to the Pre-Trial Order prepared by Plaintiff's counsel, which was entered on March 7, 2003, the issues to be determined by the court were limited solely to denial of the Debtor's discharge under § 727(a); however, on the morning of trial, upon oral motion of the Plaintiff, and by agreement of the Debtor, the Pre-Trial Order was amended to conform to the Complaint and to include as alternative relief a determination of dischargeability under § 523(a)(2)(B).

The trial of this adversary proceeding was held on April 22, 2003. The record before the court consists of four exhibits introduced into evidence, along with the testimony of Pearl Leach, the Plaintiff's representative, and the Debtor.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(I), (J) (West 1993).

I

On May 11, 1999, Pearl Leach, the Plaintiff's credit manager in its corporate office in Knoxville, received a Proprietorship, Business, Partnership Application for Credit (Application) signed by the Debtor and his son, Robert Leslie Martin. The Application was delivered to Ms. Leach from the Plaintiff's LaFollette store and was accompanied by an unsigned Personal Financial Statement as of April 28, 1999 (Financial Statement) in the Debtor's name. *See* TRIAL EX. 1 and

2. The Financial Statement showed a net worth of $413,680.00,[1] listing assets of $431,100.00, which included the cash surrender value of life insurance at $108,000.00, two vehicles with a combined value of $18,000.00, cash on hand in the aggregate amount of $28,000.00, machinery and equipment with an aggregate value of $40,000.00, and two spec homes built by the Debtor and Robert Leslie Martin with values of $195,000.00 and $187,000.00, respectively.[2] Liabilities were listed totaling $43,110.00, consisting of $420.00 owed on a real estate mortgage, and a $17,000.00 lien on one of the vehicles.[3]

Ms. Leach approved the Application on May 18, 1999, and the Plaintiff opened an account with a credit line of $10,000.00 for the Debtor and Robert Leslie Martin, who made purchases of building supplies on the account. Subsequently, payments were not made on the account, and the Plaintiff filed a Civil Warrant against the Debtor and Robert Leslie Martin in the Campbell County General Sessions Court. A Judgment By Agreement was entered by the state court on July 7, 2000, in the amount of $7,029.88 (the State Court Judgment). *See* TRIAL EX. 3. The Plaintiff later attempted to execute upon the State Court Judgment; however, it was returned by the Sheriff *nulla bona* on December 14, 2000.

The Debtor filed the Voluntary Petition commencing his Chapter 7 bankruptcy case on May 2, 2002. On August 26, 2002, the Plaintiff conducted an examination of the Debtor pursuant

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[1] This figure is not ascertainable from the assets and liabilities shown on the Financial Statement. *See infra* notes 2-3.

[2] Although the Financial Statement itself states that these amounts total $431,100.00, the amounts actually add up to $576,000.00.

[3] Again, the Financial Statement states that the total liabilities are $43,110.00, but the listed liabilities add up to only $17,420.00.

to Federal Rule of Bankruptcy Procedure 2004. At this 2004 examination, the Debtor admitted that the information reflected on the Financial Statement regarding the Debtor having $108,000.00 in cash surrender value life insurance was incorrect and that he knew the difference between term insurance and whole life insurance. However, the Debtor maintained that he did not put the information on the Financial Statement, but instead, believes that his former daughter-in-law filled it out.[4] Additionally, in the 2004 examination, the Debtor testified that a dispute arose with Mr. Herschel Taylor prior to bankruptcy regarding a custom-built house for Mr. Taylor, and that he was represented by an attorney in an action to recover the amounts owed to him by Mr. Taylor.

The Plaintiff filed its Complaint on September 10, 2002, alleging that the Debtor submitted false financial information, upon which the Plaintiff relied, in order to obtain credit. Additionally, the Plaintiff alleged that the Debtor failed to list all of his assets on his statements and schedules, in particular, his interest in a pending lawsuit against Mr. Taylor for failure to pay for work done on the custom house the Debtor and Robert Leslie Martin built for Mr. Taylor.

At trial, Ms. Leach, credit manager for the Plaintiff for nineteen years, testified regarding the account that was opened for the Debtor and Robert Leslie Martin. As previously discussed, Ms. Leach stated that she did not receive the Application and Financial Statement directly from the Debtor but that it came from the Plaintiff's LaFollette office. She also testified that she was the person who approved the Application and granted the credit account to the Debtor and Robert Leslie Martin, and that she considered and relied upon the Financial Statement in making her

[4] For convenience, the court asked that the Plaintiff introduce the entire transcript of the 2004 examination for entry as Trial Exhibit 4; however, the court will consider only those excerpts of the 2004 examination read by the Plaintiff into the record.

determination whether to extend credit under the Application, but that she also checked credit reports for both the Debtor and Robert Leslie Martin, which were ?very satisfactory." On cross-examination, however, Ms. Leach acknowledged that the figures on the Financial Statement did not add up. Ms. Leach also testified as to conversations that she had with the Debtor after the State Court Judgment was obtained concerning a debt owed to him by Mr. Taylor, stating that the Debtor had promised to pay the Judgment owed to the Plaintiff from proceeds he expected to receive from a lawsuit against Mr. Taylor.

The Debtor testified that he did not fill out the Financial Statement and that the first time he even saw the document was at his 2004 examination on August 26, 2002. Additionally, regarding the alleged debt of approximately $111,000.00 owed to him by Mr. Taylor, the Debtor testified that he believed that it had been listed in his bankruptcy statements and schedules, but that he could not remember. The Debtor's statements and schedules were not introduced into evidence as an exhibit.

II

A Chapter 7 debtor receives a general discharge of his pre-petition debts pursuant to 11 U.S.C.A. § 727, unless one of ten statutorily-defined reasons exists. Section 727 provides, in pertinent part:

> (a) The court shall grant the debtor a discharge, unless—
>
> . . . .
>
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has

> transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—
>
> > (A) property of the debtor, within one year before the date of the filing of the petition; or
> >
> > (B) property of the estate, after the date of the filing of the petition;
>
> . . . .
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case—
>
> > (A) made a false oath or account;
> >
> > . . . .
>
> (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities[.]

. . . .

> (b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter . . . .
>
> (c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

11 U.S.C.A. § 727 (West 1993). Section 727(a) is liberally construed in favor of the debtor, and the party objecting to discharge bears the burden of proof by a preponderance of the evidence. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000); *Barclays/Am. Bus. Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389, 393 (6th Cir. 1994); FED. R. BANKR. P. 4005.

A

The Plaintiff first objects to the Debtor's discharge under § 727(a)(2)(A), which ?encompasses two elements: 1) a disposition of property [including transfer or] concealment, and 2) ‹a subjective intent on the debtor's part to hinder, delay, or defraud a creditor through the act disposing of the property.'" *Keeney*, 227 F.3d at 683 (quoting *Hughes v. Lawson (In re Lawson)*, 122 F.3d 1237, 1240 (9th Cir. 1997)). The party objecting to discharge must prove actual, not constructive, intent to deceive by the debtor. *Hunter v. Sowers (In re Sowers)*, 229 B.R. 151, 157 (Bankr. N.D. Ohio 1998). Because of the inherent difficulties in proving the debtor's intentions, the plaintiff may use circumstantial evidence, including evidence of the debtor's conduct, to establish actual intent, and ?[j]ust one wrongful act may be sufficient to show actual intent . . . [although] a continuing pattern of wrongful behavior is a stronger indication [thereof]." *Sowers*, 229 B.R. at 157. Additionally, it is not necessary for the plaintiff to prove that a debtor intended to hinder and delay and defraud creditors, as proof of any one satisfies § 727(a)(2)(A). *Cuervo v. Snell (In re Snell)*, 240 B.R. 728, 730 (Bankr. S.D. Ohio 1999).

The Plaintiff asserts that the Debtor should be denied his discharge for failing to list a claim or cause of action against Mr. Taylor, constituting a concealment of property. However, the Plaintiff has not offered sufficient proof that the Debtor attempted to conceal any claims, much less that the Debtor had an actual intent to hinder, delay, or defraud his creditors. The primary proof offered by the Plaintiff concerning a claim against Mr. Taylor was an excerpt from the Debtor's 2004 examination taken on August 26, 2002, in which the Debtor testified that:

Q: Okay. Now, did you and your son build one or more houses with the materials that you bought from Tindell's?
A: One more, Herschel Taylor's.
Q: Was that a spec house or was that a custom house?
A: Custom house.
. . . .
Q: Was it built on Mr. Taylor's property?
A: Yes, sir.
Q: And did you have a contract to build that?
A: Yes, sir.
Q: A fixed sum or is it cost plus?
A: Fixed sum.
Q: How much?
A: One hundred twenty-five thousand was what we started out with, but then the house went 1972 feet bigger than what it was supposed to went.
Q: And I think you wound up in a lawsuit with Mr. Taylor, didn't you?
A: Yes, sir.
Q: And who was representing you during that lawsuit?
A: Keith Hatfield. We ain't got done anything about it yet. So Keith Hatfield is the one that represents me.
Q: And that's still pending?
A: Yes.
Q: Do you know if it's set for trial?
A: No, sir. I don't.
Q: And you've sued him - -
A: He was trying to work it out with - - talk to Mr. Taylor's lawyers or whatever, you know, to try to get something worked out without going to court.

TRIAL EX. 4, at pg. 21, ll. 25 - pg. 23, ll. 23. At trial, the Debtor testified that he believed that there was a lawsuit filed against Mr. Taylor and that he had listed the lawsuit in his bankruptcy schedules. The Plaintiff did not introduce into evidence the Debtor's statements and schedules to contradict the Debtor's testimony, nor did the Plaintiff introduce into evidence any documentation or other evidence to establish that a lawsuit against Mr. Taylor is actually pending in any court. Moreover, it does not appear to the court that the Debtor has acted with any sort of fraudulent intent. The Plaintiff did not meet its burden of proof that the Debtor was attempting to conceal a possible claim against Mr. Taylor with an actual intent to hinder, delay, or defraud his creditors.

Because § 727(a)(2) is strictly construed in favor of the Debtor, the court cannot justify denial of discharge upon the proof presented.

B

The Plaintiff next objects to the Debtor's discharge under § 727(a)(2)(B), which requires proof that **?**(1) the debtor transferred or concealed property, (2) such property constituted property of the estate, (3) the transfer or concealment occurred after the filing of the bankruptcy petition, and (4) the transfer or concealment was made with the intent to defraud the bankruptcy trustee." *Sowers*, 229 B.R. at 156. Once a creditor establishes its case, the burden shifts to the debtor to provide the court with a convincing explanation for the concealment. *Royer v. Smith (In re Smith)*, 278 B.R. 253, 257 (Bankr. M.D. Ga. 2001). As with § 727(a)(2)(A), intent under § 727(a)(2)(B) may be established by evidence of a debtor's conduct. *Sowers*, 229 B.R. at 157.

The Plaintiff also bases its objection under this section upon the Debtor's failure to list an action against Mr. Taylor in his statements and schedules, relying upon the same proof it relied upon in its claim under § 727(a)(2)(A). Once again, the Plaintiff offered no proof that the Debtor did not list the claim or that he possessed the subjective intent to hinder, delay, or defraud his creditors. The Plaintiff did not meet the burden of proof necessary to deny the Debtor's discharge under § 727(a)(2)(B).

C

Third, the Plaintiff objects to the Debtor's discharge under § 727(a)(4)(A). To satisfy § 727(a)(4)(A), the objecting party must prove: (1) that the debtor made a statement while under oath; (2) that was false; (3) that the debtor knew that the statement was false when making it; (4) that the debtor had fraudulent intent when making the statement; and (5) the statement materially related to the bankruptcy case. 11 U.S.C.A. § 727(a)(4)(A); *Keeney*, 227 F.3d at 685; *Hendon v. Oody (In re Oody)*, 249 B.R. 482, 487 (Bankr. E.D. Tenn. 2000).

A debtor's statements and schedules are executed under oath and penalty of perjury. FED. R. BANKR. P. 1008; OFFICIAL FORM 1 (Voluntary Petition); OFFICIAL FORM 7 (Statement of Financial Affairs); *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 725 (B.A.P. 6th Cir. 1999); *see also Beaubouef v. Beaubouef* (*In re Beaubouef)*, 966 F.2d 174, 178 (5th Cir. 1992). Statements made by a debtor at the meeting of creditors pursuant to 11 U.S.C.A. § 341 (West 1993 & Supp. 2002) are made under oath. *See* 11 U.S.C.A. § 343 (West 1993) (?The debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title . . . ."); FED. R. BANKR. P. 2003(c). Similarly, testimony and statements given in a deposition, *see, e.g., Brumley v. Wingard*, 269 F.3d 629, 642 (6th Cir. 2001), and at trial, *see, e.g., Workman v. Bell*, 227 F.3d 331, 341 (6th Cir. 2000), are under oath.

A debtor's knowledge that a statement is false can be evidenced by a demonstration that the debtor ?knew the truth, but nonetheless failed to give the information or gave contradictory information." *Hamo*, 233 B.R. at 725; *Sowers*, 229 B.R. at 158 (citing *Pigott v. Cline (In re*

Cline), 48 B.R. 581, 584 (Bankr. E.D. Tenn. 1985)). Fraudulent intent ?involves a material representation that [the debtor knows] to be false, or . . . an omission that [the debtor knows] will create an erroneous impression." *Keeney*, 227 F.3d at 685 (quoting *In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998)). Reckless disregard or indifference for the truth also demonstrates fraudulent intent. *Keeney*, 227 F.3d at 686; *Beaubouef*, 966 F.2d at 178. Intent may be inferred from the debtor's conduct, and a continuing pattern of omissions and/or false statements in the debtor's bankruptcy schedules exhibits reckless indifference. *Hamo*, 233 B.R. at 724-25; *Sowers*, 229 B.R. at 159. On the other hand, a debtor who mistakenly or inadvertently gives false information does not possess the requisite intent to satisfy § 727(a)(4). *Keeney*, 227 F.3d at 686; *Hamo*, 233 B.R. at 725. Generally, if a debtor amends his statements and schedules and/or reports omissions or misstatements prior to or during the meeting of creditors, courts do not find fraudulent intent. *Gold v. Guttman (In re Guttman)*, 237 B.R. 643, 647 (Bankr. E.D. Mich. 1999).

Statements are material for the purposes of § 727(a)(4) if they ?bear[] a relationship to the [debtor's] business transactions or estate, or concern[] the discovery of assets, business dealings, or the existence and disposition of property." *Keeney*, 227 F.3d at 686 (quoting *Beaubouef*, 966 F.2d at 178). Likewise, a claim is material if it hinders the administration of the [bankruptcy] estate." *Calisoff v. Calisoff (In re Calisoff)*, 92 B.R. 346, 355 (Bankr. N.D. Ill. 1988).

The Plaintiff asserts that the Debtor's discharge should be denied under this section based upon the falsity of the Financial Statement submitted to the Plaintiff in 1999 along with the Application under which the debt arose. Additionally, the Plaintiff urges the court to deny the

Debtor's discharge under this section based upon his failure to list the pending claim or cause of action against Mr. Taylor.

Once again, the Plaintiff fails to meet the burden of proof necessary for denial of discharge. As for the Plaintiff's argument that the Financial Statement was a false oath or account, a prerequisite for denial of discharge under § 727(a)(4) is that the false oath or account was made **?**in or in connection with the case." 11 U.S.C.A. § 727(a)(4). Obviously, statements made on the Application and Financial Statement submitted to the Plaintiff in 1999 were not **?**in or in connection with" the Debtor's bankruptcy case. As such, these documents cannot form the basis for denial of the Debtor's discharge under § 727(a)(4).

Next, the Plaintiff argues that the Debtor's discharge should be denied for his failure to list a pending claim or cause of action against Mr. Taylor in his statements and schedules. Clearly, this argument does fall within the purview of § 727(a)(4), in that a debtor executes his statements and schedules under oath, and a debtor's conscious failure to list a pending or potential claim or cause of action can form the basis for denying his discharge. In this case, however, the Plaintiff did not prove that the Debtor knowingly and fraudulently failed to list Mr. Taylor's claim. At trial, the Debtor acknowledged that he believes that Mr. Taylor owes him approximately $111,000.00 on a contract to build his home. Additionally, the Debtor testified that he believes a lawsuit was filed and that the claim was listed in his bankruptcy statements and schedules, but that he cannot remember for sure. Nevertheless, the Plaintiff did not introduce the Debtor's statements and schedules into evidence. Without proof to the contrary, the court takes the Debtor's testimony on

its face, as the statute is liberally construed in favor of the Debtor. The Plaintiff has not met its burden of proof justifying denial of the Debtor's discharge under § 727(a)(4).

D

As a final basis for objecting to the Debtor's discharge, the Plaintiff relies upon § 727(a)(5), alleging that the Debtor has not adequately explained any loss or deficiency of assets. The court has **?**broad power [under § 727(a)(5)] to decline to grant a discharge . . . where the debtor does not adequately explain a shortage, loss, or disappearance of assets." *In re D'Agnese*, 86 F.3d 732, 734 (7th Cir. 1996). The initial burden is on the objecting party to establish the loss or deficiency of assets by demonstrating that **?**(1) debtor at one time, not too remote from the bankruptcy, owned identifiable assets; (2) on the date debtor commenced his or her bankruptcy, debtor no longer owned the particular assets; and (3) the Bankruptcy pleadings do not reflect an adequate explanation for the disposition of the assets." *Schilling v. O'Bryan (In re O'Bryan)*, 246 B.R. 271, 279 (Bank. W.D. Ky. 1999); *see also Ernst v. Walton (In re Walton)*, 103 B.R. 151, 155 (Bankr. W.D. Ohio 1989) (A creditor establishes a prima facie case by showing that **?**[the] debtor has listed assets in his schedules at a lower figure than he has previously presented himself to be worth, or where there was an unusual and unexplained disappearance of assets shortly before the debtor filed bankruptcy.") (internal citations omitted).

The burden then shifts to the debtor to give a satisfactory explanation of the whereabouts of the assets. *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 619 (11th Cir. 1984). **?**[A] satisfactory explanation ‹must consist of more than . . . vague, indefinite, and uncorroborated'

assertions by the debtor." *D'Agnese*, 86 F.3d at 734 (quoting *Baum v. Earl Millikin, Inc. (In re Baum)*, 359 F.2d 811, 814 (7th Cir. 1966)). The explanation must be reasonable and credible, such that the court is convinced that the debtor is acting in good faith. *Fed. Deposit Ins. Corp. v. Hendren (In re Hendren)*, 51 B.R. 781, 788 (Bankr. E.D. Tenn. 1985). However, the objecting party is not required to prove that the debtor acted knowingly or fraudulently. *Walton*, 103 B.R. at 155.

The Plaintiff again asserts that the Debtor's failure to list any claim against Mr. Taylor forms the basis for denial of the Debtor's discharge under this section. However, as the court has previously found, the Plaintiff did not offer sufficient evidence to support a denial of the Debtor's discharge for his alleged failure to list a claim against Mr. Taylor in his statements and schedules. Moreover, the failure to list a claim in a debtor's statements and schedules does not constitute the dissipation of a debtor's assets, without explanation, prior to a bankruptcy filing.

III

As provided in § 727(b), even if a debtor is granted a discharge under § 727, certain individual pre-petition debts may not be dischargeable. The dischargeability of debts is governed by 11 U.S.C.A. § 523, which provides, in pertinent part:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—
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> . . . .
>
> > (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

> . . . .
>
> (B) use of a statement in writing—
>
> > (i) that is materially false;
> >
> > (ii) respecting the debtor's or an insider's financial condition;
> >
> > (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
> >
> > (iv) that the debtor caused to be made or published with intent to deceive; . . .
>
> . . . .
>
> (c)(1) Except as provided . . ., the debtor shall be discharged from a debt of a kind specified in paragraph (2), . . . of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2) . . ., as the case may be, of subsection (a) of this section.

11 U.S.C.A. § 523 (West 1993 & Supp. 2003). As with questions of a debtor's discharge under § 727(a), the party seeking determination of nondischargeability under any subsection of § 523(a) has the burden of proof by a preponderance of the evidence. *Grogan v. Garner*, 111 S. Ct. 654, 661 (1991). Likewise, § 523(a) is strictly construed against the creditor and liberally in favor of the debtor. *Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998); *Rouse v. Rouse (In re Rouse)*, 212 B.R. 885, 887 (Bankr. E.D. Tenn. 1997).

The Plaintiff also argues that the debt owed to it pursuant to the State Court Judgment is nondischargeable under § 523(a)(2)(B), based upon the falsity of the Financial Statement submitted along with the Application in May 1999. Primarily, the Plaintiff maintains that the Debtor knew the difference between term life insurance and cash surrender value life insurance, and that he

misrepresented that he had the latter on the Financial Statement. Additionally, the Plaintiff argues that it reasonably relied upon the Financial Statement when deciding to open an account for the Debtor and Robert Leslie Martin.

The writing requirement of § 523(a)(2)(B) is fulfilled by producing a written statement, ?signed, adopted or used by the debtor." *Insouth Bank v. Michael (In re Michael)*, 265 B.R. 593, 598 (Bankr. W.D. Tenn. 2001). It encompasses the use of documents actually prepared by the debtor as well as documents prepared by another. *See*, *Bellco First Fed. Credit Union v. Kaspar (In re Kaspar)*, 125 F.3d 1358, 1361 (10th Cir. 1997). Additionally, the writing must make representations about either the debtor's financial condition or that of an insider, and includes documents such as ?balance sheets, income statements, statements of changes in financial position, or income and debt statements that provide what may be described as the debtor or insider's net worth, overall financial health, or equation of assets and liabilities." *Skull Valley Band of Goshute Indians v. Chivers (In re Chivers)*, 275 B.R. 606, 615 (Bankr. D. Utah 2002).

The document must contain materially false statements; i.e., ?an important or substantial untruth. The measuring stick of material falsity is whether the [creditor] would have made the loan if the debtor's true financial condition had been known." *First Nat'l Bank v. Sansom (In re Sansom)*, 224 B.R. 49, 54 (Bankr. M.D. Tenn. 1998) (quoting *Fleming Cos. v. Eckert (In re Eckert)*, 221 B.R. 40, 44 (Bankr. S.D. Fla. 1998)); *see also Michael*, 265 B.R. at 598 (?A statement is materially false if the information offers a substantially untruthful picture of the financial condition of the debtor that affects the creditor's decision to extend credit.").

Section 523(a)(2)(B) also requires a ?reasonable reliance" by the creditor, which is judged on a case-by-case basis, in light of the totality of the circumstances. *Shaw Steel, Inc. v. Morris (In re Morris)*, 223 F.3d 548, 552-53 (7th Cir. 2000); *see also Phillips v. Coman (In re Phillips)*, 804 F.2d 930, 933 (6th Cir. 1985). ?While . . . the concept of reasonable reliance does not generally require creditors to conduct an investigation prior to entering into agreements with prospective debtors, such a precaution could be the ordinarily prudent choice . . . ." *Morris*, 223 F.3d at 554. Factors to be considered by the court include ?whether there had been previous business dealings with the debtor that gave rise to a relationship of trust; whether there were any ‹red flags' that would have alerted an ordinarily prudent lender to the possibility that the representations relied upon were not accurate; and whether even minimal investigation would have revealed the inaccuracy of the debtor's representations." *Coston v. Bank of Malvern (In re Coston)*, 991 F.2d 257, 261 (5th Cir. 1993).

Section 523(a)(2)(B)(iv) has two integral parts, first, that the debtor created the false statements, had the statements created, or allowed the statements to be ?published," and second, that the debtor intended to deceive by producing the statements. ?Publish" is defined as ?[t]o make public; to circulate; to make known to people in general. To issue; to put into circulation. . . . To declare or assert, directly or indirectly, by words or actions, that a forged instrument is genuine." BLACK'S LAW DICTIONARY 1233 (6th ed. 1994). The debtor may supply the creditor with the statements directly, or the creditor may obtain them indirectly from another source. 4 COLLIER ON BANKRUPTCY ¶ 523.08[1][e][i] (Lawrence P. King ed., 15th ed. rev. 2002). The language of the statute unambiguously states that the debtor must cause the false financial documents to be made

or published. *See* § 523(a)(2)(B)(iv). In other words, the Plaintiff must prove that the Financial Statement was either produced by the Debtor, produced for the Debtor, or requested by the Debtor.

Intent to deceive is a subjective measure that can be proved by a debtor's actions. *See Rembert*, 141 F.3d at 281. In the Sixth Circuit, **?**[§] 523(a)(2)(B)(iv) is met if a debtor is reckless when submitting financial statements that he knows are not true, not only if the debtor possesses a subjective intent to deceive." *Investors Credit Corp. v. Batie (In re Batie)*, 995 F.2d 85, 90 (6th Cir. 1993). **?**[G]ross recklessness is sufficient to establish an intent to deceive." *Bank One, Lexington, N.A. v. Woolum (In re Woolum)*, 979 F.2d 71, 73 (6th Cir. 1992). **?**Reckless disregard for the truth or falsity of a statement combined with the sheer magnitude of the resultant misrepresentation may combine to produce the inference of intent [to deceive]." *Norris v. First Nat'l Bank (In re Norris)*, 70 F.3d 27, 30 n.12 (5th Cir. 1995) (quoting *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301, 305 (11th Cir. 1994) (citations omitted)).

The Plaintiff has not met its burden of proof. Clearly, the Financial Statement is a writing purporting to represent the Debtor's financial condition. Additionally, the Debtor admitted in his 2004 examination that the Financial Statement contained false information concerning his having an interest in a cash surrender value life insurance policy in the amount of $108,000.00. However, the Debtor also denied filling out this document, insisting that he had never even seen it prior to his 2004 examination on August 26, 2002. The Plaintiff offered no proof to refute the Debtor's testimony or to prove that the Debtor **?**signed, adopted, or used" the Financial Statement or that he caused it to be published to the Plaintiff. In fact, Ms. Leach, the only representative of

the Plaintiff to testify, never saw or talked to the Debtor prior to opening the account. She received the Application and Financial Statement from another of the Plaintiff's stores. Likewise, the Plaintiff offered no proof to establish that the Debtor possessed an intent to deceive regarding the Financial Statement.

Finally, the Plaintiff did not meet its burden of proof that it "reasonably" relied upon the Financial Statement in making its determination to open the account for the Debtor and Robert Leslie Martin. Ms. Leach testified that she relied upon the Financial Statement in conjunction with the Application, even though it was not the sole factor in her decision to extend credit to the Debtor. Ms. Leach testified that the Financial Statement was important, because it indicated that the Debtor could pay the account even if his customers had not yet paid him for the materials purchased; however, she also obtained and reviewed the credit reports for both the Debtor and Robert Leslie Martin, which she testified were "very satisfactory."

The main concern for the court is the reasonableness of the Plaintiff's reliance. Ms. Leach has been the Plaintiff's credit manager for nineteen years, and she testified to being the person who approves and opens accounts for new customers. She also testified that it was sometimes necessary for her to obtain a financial statement from applicants prior to granting credit if one had not been submitted with the application. Clearly, Ms. Leach exhibited a personal knowledge and experience in dealing with these types of documents. The Financial Statement before the court is severely lacking, such that a careful examination of the document would raise "red flags." As previously stated, the individual amounts listed on the Financial Statement do not match up with the final totals. Moreover, the Financial Statement is not signed by the Debtor nor does it request specific

financial information or credit references. Instead, if merely has two columns within which assets and liabilities could be generally listed. Finally, the Debtor and his son, Robert Leslie Martin, share the same name and middle initial. Other than a line for age and spouse information, there is nothing on the Financial Statement to establish with certainty that the Debtor is, in fact, the ?Robert L. Martin" discussed within the document, which does not even list a social security number by which the Plaintiff could differentiate between the Debtor and Robert Leslie Martin. Based upon all of these factors, it seems unreasonable to the court that the Plaintiff did not require more specific information before relying upon the Financial Statement in its current state.

IV

In summary, the court finds that the Plaintiff has not met its burden of proof as to its objection to the Debtor's discharge under §§ 727(a)(2), (4), or (5), and the Debtor's discharge shall be granted forthwith. Additionally, the Plaintiff did not meet its burden of proof that the debt owed to it by the Debtor is nondischargeable under § 523(a)(2)(B). Therefore, the debt upon which the State Court Judgment is based shall be discharged.

A judgment dismissing the Complaint will be entered.

FILED: April 29, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 02-32364

ROBERT LEE MARTIN
d/b/a M&M UPHOLSTERY
d/b/a MARTIN'S MARINE & UPHOLSTERY

Debtor

TINDELL'S, INC.

Plaintiff

v. Adv. Proc. No. 02-3153

ROBERT LEE MARTIN

Defendant

J U D G M E N T

For the reasons stated in the Memorandum filed this date containing findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure, it is ORDERED, ADJUDGED, and DECREED that the Complaint Objecting to Dischargeability of a Debt and to Debtor's Discharge filed by the Plaintiff on September 10, 2002, is DISMISSED.

ENTER: April 29, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE